



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2012-0692; FRL-9902-25-Region 4]

Approval and Promulgation of Implementation Plans; Florida;

Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve in part, and disapprove in part, the State Implementation Plan (SIP) submission, submitted by the State of Florida, through the Florida Department of Environmental Protection (FDEP) on October 31, 2011, to demonstrate that the State meets the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2008 8-hour ozone national ambient air quality standards (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure” SIP. FDEP certified that the Florida SIP contains provisions that ensure the 2008 8-hour ozone NAAQS are implemented, enforced, and maintained in Florida (hereafter referred to as “infrastructure submission”). EPA is now taking two related actions on FDEP’s infrastructure submission for Florida. First, EPA is taking final action to approve that Florida’s infrastructure submission addresses all required infrastructure elements for the 2008 8-hour ozone NAAQS with the exception of the portion of the submission related to prevention of significant deterioration (PSD) regarding greenhouse gas (GHG) requirements, and the portion of the submission that

purports to meet the requirement that the SIP include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures to protect visibility in another state. Second, EPA is taking final action to disapprove in part portions of Florida's infrastructure submission as it relates to PSD requirements regarding the regulation of greenhouse gas (GHG) emissions.

EFFECTIVE DATE: This rule is effective [insert 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2012-0692. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 am to 4:30 pm excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Nacosta C. Ward, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9140. Ms. Ward can be reached via electronic mail at ward.nacosta@epa.gov.

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I. Background

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that new NAAQS. Section 110(a) of the CAA generally requires states to make a SIP submission to meet applicable requirements in order to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. These SIP submissions are commonly referred to as

“infrastructure” SIP submissions. Section 110(a) imposes the obligation upon states to make an infrastructure SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the infrastructure SIP for a new or revised NAAQS affect the content of the submission. The contents of such infrastructure SIP submissions may also vary depending upon what provisions the state’s existing SIP already contains. In the case of the 2008 8-hour ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous ozone NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for infrastructure SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include basic structural SIP elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The applicable infrastructure SIP requirements that are the subject of this rulemaking are listed below.¹

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.

¹ Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to other provisions of the CAA for submission of SIP revisions specifically applicable for attainment planning purposes. These requirements are: (1) submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA; and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today’s proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the nonattainment planning requirements of 110(a)(2)(C).

- 110(a)(2)(C): Program for enforcement of control measures.²
- 110(a)(2)(D)(i)(II): Interstate transport (prevention of significant deterioration (PSD) and visibility prongs).³
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.⁴
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

On May 20, 2013, EPA proposed to approve Florida's October 31, 2011, 2008 8-hour ozone NAAQS infrastructure SIP submission except as it relates to the regulation of GHG emissions for sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (also referred to as prong 3 of

² This rulemaking only addresses requirements for this element as they relate to attainment areas.

³ Today's final rule does not address section 110(a)(2)(D)(i)(I) (the significant contribution to nonattainment prong or the interfere with maintenance prong) for the 2008 8-hour Ozone NAAQS, which as described in greater detail below, EPA does not presently view as a "required submission" consistent with the D.C. Circuit Court's recent opinion in *EME City Generation v. EPA*, 696 F.3d 7, 31 (D.C. Cir. 2012). In that opinion, the D.C. Circuit Court concluded that a SIP submission to address section 110(a)(2)(D)(i)(I) for a new or revised NAAQS cannot be considered a "required" SIP submission until EPA has first defined a state's obligations pursuant to that section. *See EME Homer City*, 696 F.3d at 32 ("A SIP logically cannot be deemed to lack a 'required submission' or deemed to be deficient for failure to meet the good neighbor obligation before EPA quantifies the good neighbor obligation.")

⁴ This requirement as mentioned above is not relevant to today's proposed rulemaking.

110(a)(2)(D)(i)),⁵ and 110(a)(2)(J), which EPA proposed to disapprove, and section 110(a)(2)(D)(i)(II) (also referred to as prong 4 of 110(a)(2)(D)(i)), related to provisions prohibiting any source or other type of emissions activity in one state from interfering with measures to protect visibility in another state, which EPA will address in a separate action. *See* 78 FR 29306.

EPA proposed disapproval in part of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J), because Florida did not submit a SIP revision to adopt the appropriate emission thresholds for determining which new stationary sources and modification projects become subject to PSD permitting requirements for their GHG emissions as promulgated in the GHG Tailoring Rule. *See* 75 FR 31514. Therefore, Florida's federally-approved SIP does not address or provide adequate legal authority for, the implementation of a GHG PSD program in Florida. Approval of a revision to address GHG is required to meet sections 110(a)(2)(C), D(i)(II), and (J) related to PSD. On December 30, 2010, EPA promulgated a Federal Implementation Plan (FIP)⁶ under CAA section 110(c)(1)(A) for Florida to govern PSD permitting for GHG in the State. Since the Florida SIP currently does not provide adequate legal authority to address the new GHG PSD permitting requirements at or above the emissions levels set in the GHG Tailoring Rule, or at other appropriate levels, it does not satisfy the portions of the aforementioned infrastructure requirements.

⁵ Section 110(a)(2)(D)(i) includes four requirements referred to as prongs 1 through 4. Prongs 1 and 2 are provided at section 110(a)(2)(D)(i)(I); prongs 3 and 4 are provided at section 110(a)(2)(D)(i)(II). This only relates to the PSD requirements of section 110(a)(2)(D)(i)(II), also known as prong 3.

⁶ Action to Ensure Authority to Issue Permits under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan—Final Rule, 75 FR 82246 (December 30, 2010).

Florida's October 31, 2011, 2008 8-hour ozone infrastructure submission also addressed CAA section 110(a)(2)(D)(i)(I), which requires that SIPs contain adequate provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment or interference with maintenance of the NAAQS in another state. On April 30, 2013, following the *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) decision, Florida withdrew its submission for section 110(a)(2)(D)(i)(I). In *EME Homer City*, the U.S. Court of Appeals for the D.C. Circuit concluded that a section 110(a)(2)(D)(i)(I) SIP submission cannot be considered a "required" SIP submission until EPA has defined a state's obligations pursuant to that section. *See EME Homer City*, 696 F.3d at 32 ("A SIP logically cannot be deemed to lack a 'required submission' or deemed to be deficient for failure to meet the good neighbor obligation before EPA quantifies the good neighbor obligation.") Under this decision, therefore, states like Florida have no obligation to make a SIP submission to address CAA 110(a)(2)(D)(i)(I) until EPA has defined the state's obligations. On June 24, 2013, the Supreme Court granted the petitions of the United States and others and agreed to review the merits of the D.C. Circuit decision in *EME Homer City* during the Court's 2013 term. *See EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *cert. granted* 133 U.S. 2857 (2013). The United States' brief was filed on September 4, 2013 and oral argument has been scheduled for December 10, 2013. At this time, however, the D.C. Circuit's decision remains in place. EPA intends to act in accordance with the D.C. Circuit opinion in *EME Homer City* unless it is reversed or otherwise modified by the Supreme Court.

II. This Action

In this rulemaking, EPA is taking final action to approve Florida's infrastructure submission as demonstrating that the State meets the applicable requirements of sections

110(a)(1) and (2) of the CAA for the 2008 8-hour ozone NAAQS, with the exception of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) as it relates to the regulation of GHG emissions and prong 4 of 110(a)(2)(D)(i) as it relates to the visibility requirements. EPA is taking no action with respect to section 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS in this rulemaking because no such action is required at this time for this State. EPA will be taking action on 110(a)(2)(D)(i)(I), if required, in a separate future action.

Today's final action to disapprove sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) as it relates to the regulation of GHG emissions does not result in any further obligation on the part of Florida, because, as described above, EPA has already promulgated a FIP for the Florida PSD program to address permitting GHGs at or above the GHG Tailoring Rule thresholds. *See* 76 FR 25178. Thus, today's final action to disapprove FDEP's submission for the PSD-related portions of sections 110(a)(2)(C), prong 3 of (D)(i), and (J), once final, will not require any further action by either FDEP or EPA.

III. Final Action

EPA is taking final action to approve two related actions on Florida's October 31, 2011, submission. First, with the exception of section 110(a)(2)(D)(i)(I) as it relates to interstate transport, the visibility requirements of section 110(a)(2)(D)(i)(II), and the portions of sections 110(a)(2)(C), D(i)(II), and (J) related to GHG PSD permitting, EPA is approving Florida's infrastructure submission because it addresses the required infrastructure elements for the 2008 8-hour ozone NAAQS. With respect to the portions of sections 110(a)(2)(C), D(i)(II), and (J) related to GHG PSD permitting requirements, specifically the regulation of GHG emissions,

EPA is taking final action to disapprove Florida's submission related to these requirements.

With the exceptions noted above FDEP has addressed the elements of the CAA 110(a)(1) and (2) SIP requirements pursuant to section 110 of the CAA to ensure that the 2008 8-hour ozone NAAQS are implemented, enforced, and maintained in Florida.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);

- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 21, 2013

Beverly H. Banister

Acting Regional Administrator,

Region 4.

40 CFR part 52 is amended as follows:

PART 52-[APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart K—Florida

2. Section 52.520(e), is amended by adding a new entry “110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards” at the end of the table to read as follows:

§ 52.520 Identification of plan.

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(e) * * *

EPA-Approved Florida Non-regulatory Provisions

Provision	State effective date	EPA approval date	Federal Register notice	Explanation
**	**	*	*	*
110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards	10/31/2011	[Insert date of publication in <u>Federal Register</u>]	[Insert citation of publication]	With the exception of section 110(a)(2)(D)(i)(I) concerning interstate transport; section 110(a)(2)(D)(i)(II) concerning visibility requirements; and the portions of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J)

				related to the regulation of GHG emissions, which are being disapproved
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3. Section 52.522 is amended by designating the existing paragraph as paragraph (a) and adding paragraph (b) to read as follows:

§ 52.522 Approval status.

(a) * * *

(b) *Disapproval.* Submittal from the State of Florida, through the Florida Department of Environmental Protection (FDEP) on October 31, 2011, to address the Clean Air Act (CAA) sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J) for the 2008 8-hour Ozone National Ambient Air Quality Standards related to prevention of significant deterioration (PSD) requirements for the regulation of greenhouse gas emissions. EPA is disapproving FDEP's submittal with respect to the PSD requirements of CAA sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J) for the 2008 8-hour Ozone National Ambient Air Quality Standards related to PSD requirements for the regulation of greenhouse gas emissions.

[FR Doc. 2013-25985 Filed 10/31/2013 at 8:45 am; Publication Date: 11/01/2013]